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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

BRIGGS & STRATTON CORPORATION,
a Delaware corporation, and
MICHAEL HAMILTON,

Petitioners,

v.

MALCOLM BALDRIGE, Secretary of
the United States Department of
Commerce et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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May 1984

20 pp

QUESTIONS PRESENTED

Petitioners hereby join in the petition for Writ of Certiorari heretofore filed by The Trane Company, et al. as petitioners for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in respect of appeals consolidated with the appeals of these petitioners before the United States Court of Appeals for the Seventh Circuit and subject to the same judgment of that court which issued on February 24, 1984. In respect of joining the petition of The Trane Company, et al., these petitioners hereby adopt, except as augmented herein, the portions of the petition of The Trane Company, et al. denominated: QUESTIONS PRESENTED; OPINIONS BELOW; JURISDICTION; STATUTES AND REGULATIONS INVOLVED; STATEMENT OF THE CASE; REASONS FOR GRANTING THE WRIT; and, CONCLUSION.

The questions presented in The Trane Company petition are also presented here. In addition, the following question is presented:

> Where the applicable statute (Export Administration Act of 1979) provides that it is unlawful to furnish information with intent to comply with, further, or support a boycott, have the regulations (Export Administration Regulations) properly interpreted that statutory provision by conclusively presuming such intent from the mere act of furnishing truthful business information in response to a questionnaire issued by a boycott office where, because of the character of the responder as a component manufacturer who does business in Israel, (a) not responding to the questionnaire is likely to result in loss of world-wide business and an expansion of the effect of the boycott; and, (b) response would not expand the effect of the boycott?[1]

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[1] In addition to Malcolm Baldrige, the other Respondents are Lionel H. Olmer, Under Secretary for International Trade of the United States Department of Commerce, William French Smith, Attorney General of the United States, and Ronald Reagan, President of the United States.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Briggs & Stratton Corporation and Michael Hamilton respectfully pray that a Writ of Certiorari issue to review the judgment and decision entered by the United States Court of Appeals for the Seventh Circuit on February 24, 1984, rehearing denied March 26, 1984.

OPINIONS BELOW

In addition to the opinions below reflected in The Trane Company petition and reprinted as appendices to such petition, the Court of Appeals for the Seventh Circuit denied the petition of these petitioners for rehearing on March 26, 1984; a copy of that unpublished order appears as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on February 24, 1984. A timely petition for rehearing was denied on March 26, 1984. This petition for certiorari has been filed within 90 days of the date of that denial. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. §1254(1) and Rule 22(3) of the Supreme Court Rules.

STATUTES AND REGULATIONS INVOLVED

The same constitutional, statutory and regulatory provisions as found in The Trane Company petition related to this petition.

STATEMENT OF THE CASE

(a) Nature of the Case

Briggs & Stratton Corporation and Hamilton, one of its officers, hereinafter collectively referred to as "Briggs", like The Trane Company, et al., commenced an action in the District Court seeking declaratory and injunctive relief against the Department of Commerce Regulations' interpretation of the Export Administration Act asserting that the interpretation is wrong and if sustained renders the statute itself unconstitutional as applied to Briggs under the First, Fifth and Ninth Amendments. All material facts were stipulated. The parties filed cross motions for summary judgment. Briggs requested that the District Court grant its motion for summary judgment and declare the interpretation of the Act by the Regulations void. In the event the District Court sustained that interpretation, Briggs requested that the District Court declare the Act itself unconstitutional. In either event, Briggs requested that the District Court enjoin the government from enforcing the Act, as interpreted, against Briggs.

In a "Decision and Order" dated May 4, 1982, District Judge Myron L. Gordon granted the defendants-appellees' motion for summary judgment and denied Briggs' motion for summary judgment. In a "Decision and Order" dated August 4, 1982, the same judge denied Briggs' motion for reconsideration. These Decisions and Orders are reported at 539 F.Supp. 1307 and 544 F.Supp. 667.

The Court of Appeals after discussing the constitutional questions jointly raised by all participants in the consolidated appeal, affirmed, adopting, without discussion, the reasoning of the District Court as to the additional question presented by this petition here and solely by these petitioners below.

(b) Statement of Facts

Like in The Trane Company case, the parties here have stipulated the facts and the stipulation is reprinted exclusive of exhibits as Appendix B.

The factual background out of which the Briggs case arises is similar to that of the background in Trane in that both cases have their setting against the Arab boycott situation, the plaintiffs have received boycott questionnaires, blacklisting is probable as to all parties upon failure to answer and the Department of Commerce has taken the position that answers to the questionnaires may not be made. However, there is one significant difference between the Briggs and the Trane situations from a statutory and regulatory interpretation standpoint dealing with the question of intent. Briggs does not manufacture or sell an end product; it manufactures only components for incorporation in an end product. The products manufactured by Briggs' customers are usually manufactured in large quantities using assembly line techniques in which customers design their products to use a particular engine model and are not able to change engines dependent upon the destination of a particular order.

Manufacturers in Australia, England, France, Germany, Japan, the United States and other countries sell products powered by Briggs engines to customers all over the world. The Arab countries are a segment and only a minor volume segment of this worldwide market. Because Briggs has been placed on some Arab country blacklists, and because of the standardization by its customers on a particular engine model, a number of its customers have notified it that they can no longer use its engines as components of products they will ship not only to the Arab countries but to all other countries as well.

Because of the unique character of Briggs as a component manufacturer whose customers standardize on the components they

in turn incorporate in end products, the effect of Briggs being unable to answer Arab inquiries, if the failure to answer results in blacklisting of Briggs' products in Arab countries, is to give the blacklisting of Briggs' substantially worldwide effect due to the fact that Briggs' customers will standardize on other engines, thus preventing the sales of Briggs engines as components of their products throughout the customers' trading area, which normally extends into many marketing areas, only a small part of which is found in the League of Arab States. Thus failure to answer the questionnaire extends the impact of the boycott; answering limits the impact of the boycott. Surely answering in such circumstances cannot be intended to further, support, or comply with the boycott.

REASONS FOR GRANTING THE WRIT

In addition to the reasons for granting the writ reflected in The Trane Company petition, examination of the nature of the business transacted by the parties to these petitions reflects that the entire spectrum of the manufacturing capabilities of the United States are involved, from those of the conglomerate manufacturer, United Technologies, which manufactures sophisticated major weapons systems, among other things, through The Trane Company which manufactures consumer products in the form of air conditioning devices, as well as including a component supplier, Briggs & Stratton Corporation, which is reflective of all of those companies who only make parts which other manufacturers in turn use to manufacture end products. Not only is the totality of United States manufacture and the export of their products before the court in a constitutional setting, but also the questions presented by this precise petition relating to a component manufacturer and the interpretation of the Export Administration Act by the Export Administration Regulations in the setting of a component manufacturer, has never been passed on by a court. Rather, the district court bypassed the question after first alluding to it in favor of a discussion of the broad constitutional questions and the Court of Appeals by adopting the decision and reasoning of the district court in respect of that question, likewise, never met the question. This court, for the first time, will be looking at the question of whether or not the regulations do deem intent out of the statute and if so, whether that can be done constitutionally.

Congress passed a law which authorized the adoption of regulations prohibiting:

> Any United States person. . .from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation.
>
> (D) Furnishing information about whether any person, has, has had, or proposed to have any business relationship (including a relationship by way of sale, purchase, legal or commercial representation, shipping or other transport, insurance, investment, or supply) with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country. . . .

50 U.S.C. App. §2407(a) (emphasis added).

The offense defined by the statute has two elements: one, furnish information, and two, do so with intent to comply with, further or support the boycott. However, the regulations "interpret" the intent requirement out of the statute by "deeming" it to exist:

> Reason or purpose can be proved by circumstantial evidence. For example, if a person receives a request to supply certain boycott information, the furnishing of which is prohibited by this part, and he knowingly supplies that information in response, he clearly intends to comply with that boycott request. It is irrelevant that he may disagree with or object to the boycott itself. Information will be deemed to be furnished with the requisite intent if the person furnishing the information knows that it was sought for boycott purposes.

15 C.F.R. § 369.1(e)(5) (1981) (emphasis added).

Astonishingly, and without statutory authority, the regulations drop the statutory requirement of intent by conclusively presuming intent in any case in which a "knowing. . .response" is supplied. Intent to comply with the boycott is presumed because Briggs knowingly furnishes information.

The regulators leap from the assertion that circumstantial evidence may be used to prove intent to their own verdict that, in all cases, a response to a request shall be "deemed" sufficient to prove beyond a reasonable doubt intent to comply with a boycott. Thus, intent to comply with the boycott is conclusively presumed from a knowing response to a request for information. But the statute only prohibits furnishing information if done with intent to comply with, further or support a boycott; it does not prohibit furnishing of information to anyone without such intent. By administrative fiat, the necessary element of intent to comply with, further or support the boycott is read out of the statute; the regulations presume the requisite statutory intent from the fact of furnishing information. The fact of furnishing information alone thereby becomes a criminal act regardless of disagreement with the boycott and for that matter regardless of the fact that objective business dealings which disregard the boycott are present, objective dealings which demonstrate the nonexistence of the proscribed statutory intent.

This conclusive presumption of intent, adopted by administrative fiat is contrary to the plain meaning of the statute and contravenes one of the most basic principles in our system of justice: that every element of a criminal offense must be proved beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). No element may be presumed to exist. A presumption of intent, even when rebuttable, violates the constitution. Sandstrom v. Montana, 442 U.S. 510 (1979); Harris v. Israel, 515 F.Supp. 568 (E.D. Wis. 1981). Here, the presumption is made irrebuttable. Clearly, that presumption cannot stand. "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." Morissette v. United States, 342 U.S. 246, 274 (1952). See also, Sandstrom v. Montana, supra; United States v. United States Gypsum Co., 438 U.S. 422 (1978).

CONCLUSION

For the reasons stated in The Trane Company petition, the Writ of Certiorari should be granted both in that case and in this case. In addition, this case presents the inadvertent and tacit approval of a regulatory scheme which causes an interpretation of a statute in a manner to create unconstitutionality in that statute pursuant to the decisions of this Court thereby rendering such tacit approval in conflict with the decisions of this Court.

The Petition for Certiorari sought herein should be granted.

Respectfully submitted,

ELWIN J. ZARWELL
SAMUEL J. RECHT
CAROLYN A. GNAEDINGER

Attorneys for Petitioners
Briggs & Stratton Corporation
and Michael Hamilton

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 26, 1984.

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge*

BRIGGS & STRATTON CORPORATION and MICHAEL HAMILTON, Plaintiffs-Appellants,	Appeal from the United States District Court for the Eastern District of Wisconsin.
Nos. 82-2112, 82-2392 vs.	No. 80 C 721
MALCOLM BALDRIGE, Secretary of the United States Department of Commerce, et al., Defendants-Appellees.	Myron L. Gordon, Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, sitting by designation.

APPENDIX B

STIPULATED FACTS

The parties have stipulated the facts:

1. Briggs & Stratton Corporation ("Briggs") is a Delaware corporation, licensed to do business in the State of Wisconsin, which has its principal office and place of business in the Eastern District of Wisconsin and as a manufacturer of internal combustion engines, has its corporate headquarters at 3300 North 124 Street in the City of Wauwatosa, Wisconsin 53222. Briggs presently manufactures products which are exported by Briggs' customers to Kuwait, Saudi Arabia, and other states which are members of the League of Arab States, primarily as components of equipment manufactured by Briggs' customers; the only direct import of Briggs' products to Arab States being for repair or replacement purposes and being insignificant in amount. Briggs' sales to persons who in turn export their products incorporating Briggs' engines to states which are members of the League of Arab States amounted to in excess of $15,000,000 in Briggs' most recently completed fiscal year ended June 30, 1980. Briggs believes that such sales for the fiscal year ending June 30, 1981 would exceed $15,000,000 but for the fact that some members of the League of Arab States have blacklisted Briggs. Briggs is making active efforts further to increase such sales and believes that there are good prospects for such increases. Such sales are profitable and currently account for the employment of in excess of 100 persons by Briggs in the United States, principally at its manufacturing plant in Wauwatosa, Wisconsin.

2. Engines manufactured by Briggs are not end products; rather they are the means to provide power for an end product. Because Briggs' engines are not end products but rather power components of another manufacturer's end product, Briggs makes the vast majority of its sales to end product manufacturers who in turn install the Briggs engine on the end product they manufacture. It is that end product that finds its way through sales channels to the consumer. Briggs does not manufacture or sell an end product; it manufactures only components for incorporation in an end product.

3. The products manufactured by Briggs' customers are usually manufactured in large quantities using assembly line techniques and placed in inventory awaiting shipment to subsequently determined destinations. For that reason, customers design their products to use a particular engine model and are not able to change engines dependent upon the destination of a particular order.

4. Manufacturers in Australia, England, France, Germany, Japan, the United States and other countries sell products powered by Briggs engines to customers all over the world. The Arab countries are a segment and only a minor volume segment of this worldwide market. Because Briggs has been placed on some Arab country blacklists, and because of the standardization by its customers on a particular engine model, a number of its customers have notified it that they can no longer use its engines as components of products they will ship not only to the Arab countries but to all other countries as well.

5. If called upon to testify, witnesses for plaintiffs would testify that engines in quantity sufficient to supply the foreign market similar to those manufactured by Briggs are available from manufacturers in such countries as Japan, Germany, France, England and Italy. The Government has no information contrary thereto, and the Court may act upon this stipulation in respect thereof with the same effect as though such witnesses had so testified.

6. The League of Arab States is composed of approximately 20 Arab states. On December 11, 1954 its council approved a resolution recommending an economic boycott of the state of Israel. Approximately 14 Arab states enforce the boycott generally, although the degree to which the boycott is enforced in each of those 14 states varies widely. Some Arab states have published implementing regulations and many have not. Some states enforce the boycott principles more conscientiously than others. The League of Arab States formed an organization called the Central Boycott Office, with headquarters presently in Damascus, Syria, which facilitates communications among the boycott offices of the individual boycotting states and makes recommendations concerning enforcement of the boycott to the individual states. The Central Boycott Office itself does not "blacklist" companies or persons, nor does it take direct enforcement action against "blacklisted" companies or persons. Decisions about "blacklisting" and its consequences are made by individual boycotting states.

7. Israel is a country friendly to the United States and is not itself the object of any form of boycott pursuant to United States law or regulation.

8. The economic boycott of Israel, enforced by member states of the League of Arab States in varying degrees, may include banning the importation into such member state of products manufactured by, or banning the importation into such member state of products containing substantial components manufactured by, as well as a ban on dealing with, any firm which has been blacklisted by reason of perceived or suspected activities deemed to be inconsistent with the purported "General Principles for the Boycott of Israel" (June 1972), published by the Central Boycott Office and the League of Arab States [Exhibit A]. One such perceived or suspected activity, according to those purported "General Principles," is the failure to respond to a request for information about the relationships of that firm or its affiliates with Israel. But for the existence of provisions of the Export Administration Act and the Regulations which prohibit the providing of such information if all jurisdictional tests are met and no specific exception to the prohibition exists, Briggs would respond to requests for such information from states which are members of the League of Arab States or persons therein, in order to preserve and expand its sales of components to exporters to such countries and the resulting profits and employment opportunities.

9. Michael Hamilton ("Hamilton") is Vice President, International Sales, of Briggs. He is a permanent resident alien who resides at 12530 Gremoor Dr., Elm Grove, Wisconsin 53122. He is the official of Briggs who in the ordinary course of business would respond to requests for information from member states of the League of Arab States. He devotes approximately 100 percent of his working time to matters related to Briggs' export business, a substantial part of which has been and would continue to be adversely affected by Briggs' blacklisting by one or more Arab states.

10. Malcolm Baldrige is the duly appointed Secretary of Commerce of the United States. He is authorized to impose the sanctions specified in Section 11 of the Export Administration Act, 50 U.S.C. App. §2410, including civil penalties of up to $10,000 for each violation of the Export Administration Act or the Regulations, and revocation or suspension of the authority to export goods. The President of the United States has also delegated to the Secretary cer-

tain power, authority, and discretion conferred upon him by the Export Administration Act, including the powers and duties to carry out prohibitions on the furnishing of information relating to foreign boycotts.

11. Lionel H. Olmer is the duly appointed Under Secretary for International Trade of the United States Department of Commerce. He is an "officer or employee of such department . . . . specifically designated by the head thereof" within the meaning of Section 7(a) of the Export Administration Act, 50 U.S.C. App. §2410 (c)(1), and as such may impose the civil sanctions provided for in Section 11(c) of the Export Administration Act for each violation of that Act or of the Regulations.

12. William French Smith is the duly appointed Attorney General of the United States. As such, he is charged with the enforcement of criminal sanctions under the Export Administration Act. These sanctions, as set forth in Section 11 of the Act, 50 U.S.C. App. §2410, include fines of not more than five times the value of the exports involved or $50,000, whichever is greater, or imprisonment for not more than five years or both for violation of the Export Administration Act or the Regulations.

13. Ronald Reagan is the duly elected President of the United States. He is authorized under provisions of the Export Administration Act to effectuate the policies of the Export Administration Act, including those expressed in Section 8(5), 50 U.S.C. App. §2402(5), concerning the supply of information relating to a boycott. He is further directed under Section 8(a)(1) of the Export Administration Act, 50 U.S.C. App. §2407(a)(1), to issue rules and regulations interpreting the Export Administration Act.

14. Commerce Department officials have advised plaintiff Briggs that under the facts herein set forth, any answer made by plaintiff Briggs which is responsive to the request hereinafter described would contravene the Regulations herein described and that defendants would, upon learning that any information had been furnished by Briggs or on its behalf, in contravention of the Regulations, so construed, seek to impose one or more of the above described penalties.

15. On or about May 9, 1977, plaintiffs received a letter [Exhibit B] from Georges A. K. Kabbabe, the distributor of plaintiff Briggs' products in Syria, enclosing a document having thereon a list of questions [Exhibit C] from the "Economical Department" [Ministry of Economy and Foreign Trade] of Syria. That document, Exhibit

C, is a request for information response to which is proscribed by existing regulations interpreting existing federal law as is hereinafter explained, if all jurisdictional tests are met and no specific exception to the prohibition exists. Briggs sought to respond by letter to the Syrian inquiries prior to the time that answers thereto were proscribed by federal law or regulations. [Exhibit D] However, Briggs' attempted response failed because it was not authenticated by an Arab consular officer. When the same was subsequently returned for such authentication, the Regulations interpreting then existing federal law prevented Briggs from furnishing any answer, authenticated or not. [Exhibit E]

16. Briggs, subsequent to its failure to return the authenticated answers within the time limit set by the "Economical Department" of Syria, was blacklisted by Syria and subsequently by Saudi Arabia, Bahrain, Oman and Kuwait, other member states of the League of Arab States. [Exhibits F and I] In order to preserve and expand its business, profits, and employment, Briggs believes it is necessary to and desires to answer and would answer the described inquiries if it were not that it fears being subjected to the penalties set forth in Section 11 of the Export Administration Act of 1979; such belief being based on its interpretation of the tenor and import of the Regulations adopted thereunder as aforesaid.

17. Briggs believes it was so blacklisted for failing to answer the inquiries of the "Economical Department" of Syria and Briggs also believes that if Briggs does not answer the questionnaire, it will remain blacklisted and/or boycotted by Syria, Kuwait, Bahrain, Saudi Arabia, Oman and soon thereafter may be blacklisted or boycotted by other countries participating in the Arab boycott. According to paragraph "15, First, g" of the "General Principles for Boycott of Israel" published in June, 1972, by the League of Arab States' Head Office for the Boycott of Israel, in Damascus, Syria, blacklisting occurs under regulations issued by the Arab countries if, within the appropriate period, a company does not reply to questions submitted to it.

18. Notwithstanding the fact that Briggs has failed to answer the inquiries of the Syrian "Economical Department," Briggs and the Government have learned that at a meeting of Arab boycott officials in Damascus in or about April, 1981 it was decided to lift the blacklisting sanctions previously imposed on Briggs. Briggs has received notice confirming this action, and at the present time end

products containing components manufactured by Briggs are being granted entry into all Arab States. [Exhibits G and H]

19. As a result of being blacklisted and/or boycotted, Briggs has lost a portion of and may lose additional sales and profits, as described in paragraph 1 hereof. [Exhibits I and J] The employment of in excess of 100 persons in the United States depends on these sales.

20. Hamilton wishes to respond to the questions referred to in pursuance of his duties as a Briggs official. Hamilton fears that the result of a failure by him to respond will be the continued blacklisting and/or boycotting of his employer Briggs.

21. The plaintiffs are not aware of any basis for Briggs being blacklisted under the purported "General Principles for Boycott of Israel" described above except for the failure and refusal to answer the communication from the "Economical Department" of Syria above described, though Briggs has in the past and intends in the future to trade with persons in Israel and in all other respects conduct its business without regard to such purported "General Principles".

22. Because of the unique character of Briggs as a component manufacturer whose customers standardize on the components they in turn incorporate in end products, the effect of Briggs being unable to answer Arab inquiries, if the failure to answer results in blacklisting of Briggs' products in Arab countries, is to give the blacklisting of Briggs substantially worldwide effect due to the fact that Briggs' customers will standardize on other engines, thus preventing the sales of Briggs' engines as components of their products throughout the customers' trading area, which normally extends into many marketing areas. only a small part of which is found in the League of Arab States.

23. Because the enforcement of the economic boycott of Israel by Arab League states is haphazard, it is impossible to predict with certainty what action a member state will take in a specific circumstance. Nevertheless, the Government agrees with Briggs that the failure to answer an inquiry from an authority charged with the boycott of Israel by the League of Arab States increases the risk or likelihood of being blacklisted by one or more Arab states. However, persons have been allowed to trade with one or more members of the League of Arab States, although subject to a trade ban or blacklisting by one or more members of the League of Arab

States. Factors affecting a decision, however temporary, to allow a blacklisted firm or person to trade with or in a boycotting country may include one or more of the following: "national interest" determinations; on the business interests of an influential Arab importer; "flexibility" on the part of local boycott offices; goods and services particularly desired by Arab governments; "selective exceptions policies" on the part of local boycott offices; "equipment necessary to complete projects under way"; and decisions in some countries to enforce only the primary boycott of Israel. Persons have been blacklisted by one or more members of the League of Arab States but not by others, and hundreds of persons who were blacklisted by one or more members of the League of Arab States, or recommended for such treatment by the Central Boycott Office, were subsequently removed from the blacklists. Most cases of deblacklisting have come to public attention through routine announcements in the gazettes of the member states without any reason given for the action.